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Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Nancy A. Konig, Appellant

vs.

Jay Picking, Appellee

On Appeal From The Court of Appeal Of
The State Of California
Second Appellate District

JURISDICTIONAL STATEMENT

February, 1987

Nancy Ann Konig, in Pro Se
Appellant and Plaintiff
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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. Whether the Court of Appeal violated appellant's right to "Due Process", which was not mere error, but a deliberate, arbitrary, and capricious effort to prejudice her, resulting in a miscarriage of justice.

2. Whether the Court of Appeal ignored factual and legal contentions presented by appellant and failed to follow laws and decisions of federal and state courts, and even fabricated facts and falsified evidence so as to prejudice appellant.

3. Whether the Court of Appeal failed to follow FRCP 60(b), which states there are no time limitations for "fraud upon the court", which is appellant's action.

4. Whether the Court of Appeal failed to follow federal courts' decisions that an "unconscionable scheme designed to improperly influence the court's decisions"constitutes an action for "fraud upon the court", which appellant stated as her action.

5. Whether appellant's Amended Complaint, listing I5 instances of false statements made by the respondant/attorney to the courts,on all the main aspects of the prior municipal court action, states sufficient facts of an "unconscionable scheme",which constitutes an action for "fraud upon the court".

6. Whether the Court of Appeal failed to follow FRCP 60(b) which permits both a motion to vacate and an independent action, because it found the motion bars the present action.

7. Whether the Court of Appeal failed to follow California Code of Civil Procedure I005.5, even though appellant produced transcripts to show she was not permitted to present her motions,at the hearings of her Motion to Vacate and her Motion for Reconsideration.

8. Whether it was an abuse of discretion by the Court of Appeal to ignore the fact that the respondant would not answer appellant's Request for Admissions , even when ordered to do so, upon appellant's motion. And that he

also committed perjury, in a Supporting Declaration.

9. Whether the Court of Appeal abused its discretion in ignoring the superior court's reluctance to state specific ground(s) for sustaining the demurrer, without leave to amend under California Code of Civil Procedure 472d, until the end of the hearing on her Motion for Reconsideration, making her opposition difficult.

IO. Whether the Court of Appeal abused its discretion in finding, that to permit appellant to file an Amended Complaint to add a new defendant would not have done any good, as appellant's written pleadings did not establish fraud. Whether stating an action for fraud and not establishing fraud is all that is required, before a trial on the merits.

II. Whether it was improper for the Court of Appeal to incorrectly state, that there was an order of dismissal--the complaint was dismissed. When there was,instead, a judgment of

of dismissal of the action, entered into the record. Whether this was an attempt to make it appear to a higher Court, that it would, therefore, not have jurisdiction of this appeal?

I2. Whether it was proper for the Court of Appeal to threaten appellant with financial sanctions, if she appealed her case further, so as to protect the respondent/attorney and the judicial system.

I3. Whether the Court of Appeal should ignore appellant's legal contention regarding the controlling law upon which the municipal court judgment was rendered. California Civil Code 789.3(b) requires that the property be used by the tenant as her residence, yet the tenant vacated and unilaterally surrendered(abandoned) said unit one month before the judgment claimed a violation.

I4. If, according to California Civil Code 1951.2, the lease terminates upon abandonment, then it is immediate, final

and cannot be revived. Whether a Notice of A Belief of Abandonment by the landlord is required under California Civil Code 1951.3(f) when there was a written Notice of Surrender by the tenant.

15. Whether the Court of Appeal falsely stated the contents of a letter, in evidence, to make it appear that appellant breached the lease, instead of the tenant, Abbott.

16. If a tenant was served notice of the landlord's small claims action for delinquent rent prior to the tenant carrying out her written Notice of Surrender, by vacating, would this not show that the landlord's action did not alter the tenant's prior plan to carry out a surrender.

17. Whether the Court of Appeal falsely stated that appellant filed 3 small claims actions for rent, after the tenant vacated and abandoned the unit. That in the Court's opinion this meant that the abandonment was not valid, and the tenant still had possession, thereafter, and not the appellant/landlord.

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IN THE

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OCTOBER TERM, 1986

Nancy A. Konig, Appellant

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On Appeal From The Court of Appeal Of The State of California, Second Appellate District

JURISDICTIONAL STATEMENT

OPINIONS BELOW

On August 7, 1986, the Court of Appeal of the State of California, Second Appellate District affirmed the judgment of dismissal of the Superior Court of the State of California, County of Los Angeles, which was unreported. (12a).

JURISDICTION

The superior court ordered a judgment of dismissal of appellant's case, in equity, for "fraud upon the court", entered July 1, 1985, after respondent's demurrer to appellant's

Amended Complaint was sustained, without leave to amend. (Ia) Appellant filed her appeal to the Court of Appeal on August 2, I985, and on August 7, I986, the Judgment of Dismissal was affirmed. (I2a). On August 29, I986, a rehearing was denied. (I3a). On October 22, I986, the California Supreme Court denied Review. (I4a) A Notice of Appeal to this Court was filed in the Court of Appeal on January 9, I987 (I5a). On January I5, I987, Associate Justice Sandra D. O'Connor extended time to docket the appeal to and including February I9, I987. (I6a).

The jurisdiction of this Court is involked under 28 U.S.C., section I257, because appellant exhausted her legal remedies and appealed her case to the highest state court in California, which was a civil action.

CONSTITUTIONAL PROVISION AND STATUTES

Federal Constitution-Fourteenth Amendment

California Civil Code 789.3(b)

California Civil Code I95I.2

California Civil Code 1951.3(f)

California Code of Civil Procedure 472d

California Code of Civil Procedure 1005.5

Federal Rule of Civil Procedure 60(b)

28 U.S.C., section 1257

28 U.S.C., section 2103

(Citations are included in the appendixes)

STATEMENT OF THE CASE

The present action, in equity, is for vacation of the prior judgment, in the case below, based upon "fraud upon the court" perpetrated by the respondant, who was opposing counsel in the prior, parent action.

There was a judgment of dismissal of the present action in the superior court, after respondant's demurrer was sustained without leave to amend. Judgment was affirmed by the Court of Appeal.

The Court of Appeal's Opinion made only one statement on "time limitations" regarding the present action. It stated, "..time for this litigation to end has long since passed." (9a)

The Court of Appeal did not state any reason or authority--nothing to substantiate its comment, which is required. It ignored appellant's legal contention that according to Great Coastal Express v. Int'l Brotherhood of Teamsters (1980), 86 F.R.D. 132, # 7, and the

Federal Rule of Civil Procedure 60(b), the "Savings Clause":

> "There are no time limitations for "fraud upon the court".

Failure of the Court of Appeal to follow this federal law was stated in appellant's Petition for Rehearing (6:30-7:10); Appellant's Closing Brief (2:10-2:26*; also her Superior Court Motion for Reconsideration.[1] (CT 188:2) Both courts ignored appellant's legal contentions, which show the intentional bias towards appellant.

One of respondent's grounds for his demurrer was that appellant's Amended Complaint did not state a cause of action for "fraud upon the court". Appellant replied that because respondent is an attorney and an officer of the court, he is in a special position of trust. When he made false statements to the courts on all of the main aspects of the prior

I. CT refers to the Clerk's Transcript and RT will refer to the Reporter's Transcript of the "Record", filed in the Court of Appeal. A new Record is being compiled for this Court.

case, he created an imbalance in the adversary system, impaired the litigation process, thereby corrupting the administration of justice. Any fraud involving an officer of the court, is a "fraud upon the court".

In Rozier v. Ford Motor Co., 573 F.2d 1332 (1978), the Court said, "an unconscionable plan or scheme designed to improperly influence the courts in its decisions, constitutes "fraud upon the court".

Failure of the Court of Appeal to follow the federal court decision ("stare decisis"), and to completely ignore commenting upon appellant's legal contention, was stated in appellant's Petition for Rehearing (8:5); also in Appellant's Opening Brief (6:I-7:I3); Appellant's Closing Brief (I4:6); and in the Superior Court in her Opposition to Respondant's Demurrer to the Amended Complaint (CT I52:I-I53:I9) and Motion for Reconsideration (CT I9I:22- I93:I4).

The Court of Appeal's Opinion stated (9a-10a)

> "As a matter of law, facts appellant relies upon do not make out even a prima facie case of fraud, intrinsic or extrinsic. Extrinsic fraud is found where a party has been prevented from presenting his case by his opponent which results in keeping him away from court or keeping him ignorant of the lawsuit". 6 Witkin, Cal.Procedure (3d.ed) Sect. 204, p. 602.

This citation from, United States v. Throckmorton, 98 US 61,65 (1878) refers to extrinsic fraud, generally, and not the more specific "fraud upon the court". Also, the Court included it,in spite of the fact that appellant cited cases where trials had, in fact, been held. In Hazel-Atlas Glass Co., v. Hartford Empire Co., 322 US 238 (1943), a trial was, indeed, held. Ten years later, the judgment was vacated because there had been a "carefully executed scheme by the successful attorney to influence the court unduly in its decision, constituting "fraud upon the court". Any fraud involving an attorney is "fraud upon the court", a form of extrinsic fraud.

Courts have expanded their view considerably since the archaic case of Throckmorton

was heard, as to what constitutes equitable relief for "fraud upon the court". This precedent, which the Court borrowed from respondant, is not an up-to-date citing on this ground, which is required. It is also further evidence of the prejudice shown appellant's side of the case by the Courts, and the favoritism shown respondant, in every instance.

Another ground for respondant's demurrer was that appellant did not state facts sufficient to state a cause of action for "fraud upon the court". The Court of Appeal stated:

> "..an amended complaint was filed which in no way changed the factual picture." (8a)

This was the Court's only comment upon what appears to be whether or not the Amended Complaint contains facts sufficient to state a cause of action for "fraud upon the court".

Appellant's initial complaint stated only 5 instances whereby respondant made false statements to the courts. But, in her Amended Complaint, appellant added IO additional examples of false statements. Obviously, the

picture would be changed substantially by the numerous,additional facts. Appellant discussed this in Appellant's Closing Brief(I4:6) and Petition for Rehearing (7:23); in the superior court, in her Opposition to the Demurrer to the Amended Complaint (CT I53:I2) and Motion for Reconsideration (CT I9I:23), which was ignored in the superior court, and for which the Court of Appeal did not give any specific reason or authority to explain its one-sentence remark.

Appellant's Amended Complaint stated I5 instances of false statements by respondant to to show his "unconscionable plan to deceive the courts", which federal courts have rules constitutes "fraud upon the court", as appellant has stated, as her cause of action. The Court of Appeal failed to follow "stare decisis", and is therefore in "excess of jurisdiction", with regards to appellant's present action. For the purposes of a demurrer, all facts are deemed true, since no "answer" was filed by respondant and there was no trial on on the merits, with regards to "fraud upon the

court",or fraud, in general.

Appellant made a motion to vacate in the prior action, and then also filed a subsequent action, for the same cause. The Court of Appeal stated in its Opinion :

> "The superior court found appellant's action was barred by the municipal court decision which denied vacation of the judgment. Appellant now asserts she was entitled to file the superior court action because she was not provided a full hearing on her motion to vacate." (8a-9a).
>
> "There is no merit to appellant's claim that she was not afforded a full hearing in the municipal court on her motion to vacate. The basis for this complaint was the court's refusal to allow her to orally recite each of the points raised in her voluminous written pleadings. The court expressed its familiarity with the pleadings and allowed appellant ample opportunity for oral argument, and to advance any new theories or explanations she wished to put forth. No useful purpose would have been served by allowing appellant to recite orally that wh ch she already submitted in writing." (IOa-II).

Firstly, in accordance with California Code of Civil Procedure IOO5.5,appellant is not only entitled to file her written motion, but also to a hearing on her written motion. The following transcript of that hearing shows the

superior court violated this law by not permitting appellant her right, at the hearing, to present upon her motion, the issues of "fraud upon the court" . The Court of appeal appears to support the superior court. The transcript stated: (4:I-5 & 4:I4-I6)

> "MISS KONIG: Can we go through these points with the adverse attorney?
> THE COURT: He isn't going to comment and we are not going to go through each on of them.."
> MISS KONIG: Well, can I just go through them point by point?
> THE COURT: No."

The transcript shows how protective the court was of the respondent/attorney in trying to avoid an open discussion with him on the issues which would have quickly shown the judgment was erronious and should be vacated.

Appellant quoted Darlington v. Basalt Rock Co., (I96I) I88 Cal. App.2d 706, at 7I0, that when one is not permitted a detailed presentation of the issues of fraud at the hearing on her motion, it is not a bar to an action.

The Advisory Committee Notes on the I946

Amendment to the Federal Rule of Civil Procedure 60(b) specifically provides that:

> "This section does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding. Thus, the Rule by way of a "savings clause" permits a second procedure in addition to making a motion in the action in which the judgment was rendered to obtain relief from a judgment."

Therefore, appellant is entitled to both her motion to vacate and her action to vacate, and the former is not a bar to latter. Therefore, the Superior court's ground for sustaining the demurrer (and the subsequent dismissal of the action) is in error.

That the motion bars the present action was the superior court's ground for sustaining the demurrer. (CT 2I4). Because of its importance, the Court of Appeal should have spoken to this ground more specifically instead of vaguely appearing to concur with the superior court. It was discussed by appellant in her Petition for Rehearing(5:I8); in Appellant's Opening Brief (8:I8); Appellant's Closing Brief (8:I0) and also discussed in the superior court in

her Opposition to the Demurrer to the Amended Complaint (CT 155:10).

Not only was appellant denied a hearing on her Motion to Vacate, she was also denied a hearing on her Motion for Reconsideration of the Order Sustaining the Demurrer, Without Leave to Amend, as shown by the transcript of that hearing (RT 12:12 & 13:7):

> "THE COURT: The court has carefully read and considered the motion as well as the opposition. I don't feel that the length of the documents submitted by moving party--that further argument is necessary or required by this court.
> MISS KONIG: Your Honor, you mean you are not giving me a chance to present any points here?
> THE COURT: I don't think it is necessary. You filed voluminous papers, which take a great deal of the court's time, and it is only at the discretion of the court to hear arguments if I feel they are necessary to clarify any of the matters."

The superior court judge violated the law, with regards to appellant's rights, which prejudiced her again, with regards to section 1005.5. The Court of Appeal would not speak to this issue, at all, even though it was brought to their attention in Appellant's Opening Brief (10:12); Appellant's Closing Brief (15:10);

Initially, the superior court violated California Code of Civil Procedure 472d, which requires that the court state specific grounds when sustaining a demurrer, without leave to amend, even after appellant made this this request. This was at the hearing on the Demurrer to the Amended Complaint (RT II:7). She also did this in her written motion for Reconsideration (CT I86:23). The court's initial ruling on the Demurrer to the Amended Complaint stated:

> "Demurrer is sustained on all the grounds stated in the moving papers." (CT I83).

Upon appellant's further insistence, the court modified its ruling, at the end of the hearing on her Motion for Reconsideration, to state:

> "This action is barred by the municipal court case #243390 decision of 8-I0-84 which denied vacation of the judgment." (CT 2I4).

The court made it difficult for appellant in her opposition to the demurrer, because she had to argue all of respondant's many grounds, instead arguing only the one ground, in the modified ruling.

The Court of Appeal's Opinion stated:

> "This is an appeal from an order of dismissal after a demurrer was sustained without leave to amend." (I:I).
>
> "A demurrer to the amended complaint was sustained without leave to amend. The complaint was dismissed and this appeal followed." (5:II).

The court never stated the fact that there was a "judgment of dismissal of the action", which was entered into the record. (CT 223). This is required in order appeal to this Court. One cannot appeal from just a dismissal of the complaint. It appears the Court of Appeal wants to give the wrong impression, so that this Court would conclude that it does not have jurisdiction of this case.

The superior court ignored the fact that respondant would not "answer" appellant's Requests for Admissions, even after it had so ordered, which was noted in appellant's Motion for Reconsideration (CT I9:I6). Ordinarily this constitutes "contempt of court", but as usual, the court preferred to ignore and protect respondant/attorney from the consequences

of such misconduct. In turn, this showed the continued prejudice shown appellant's side of the case. Appellant informed respondent that the statements in the Request for Admissions were deemed admitted by him, and they show the judgment was erronious. This matter was also brought to the attention of the Court of Appeal, in appellant's Petition for Rehearing which was ignored also.(II:5).

Upon appellant's decision to appeal her case, she obtained a transcript of the hearing on her Motion for Reconsideration, which contained errors, including one which stated(RT 8:27):

> "..(respondant) disobeyed your order to answer my question for admission"

To be correct, it should have stated "disobeyed your order to answer my "Request For Admissions". The judge refused to make this or any other correction. To substantiate the fact that this correction was justified is the fact that in appellant's written Motion for Reconsideration she also makes this same statement (CT I93:I6), therefore it follows that this is

what she also stated at the hearing on her Motion for Reconsideration. Also, the hearing on the "Request for Corrections" was scheduled for 9:00 A.M.,but the judge did not appear in court until 10:00 A.M., which was the time scheduled for a trial. The judge dismissed the hearing very quickly, which was inconsiderate in view of the time appellant spent in preparing for it.

There is another matter concerning the "Request for Admissions". The superior court rejected respondant's Motion for a Protective Order", to avoid answering the "Requests", and upon appellant's motion, the court ordered the respondant to answer the "Requests" on or before February 28, 1985, which was also the date of the hearing on the Demurrer to the Amended Complaint. This gave respondant 42 days instead of the 30 days provided under the statute, even though appellant had requested they be answered <u>before</u> that hearing. Since that hearing would be in the morning, respondant could,therefore, wait and serve the "answers"

after that hearing, or not at all. In that way, appellant would not be able to inform the court, at the hearing, that respondant disobeyed the order to answer the Requests for Admissions. It appears that perhaps the court knew it would sustain the demurrer, without leave to amend, and therefore the case would be dismissed. Then,respondant could avoid having to answer and the court could avoid the matter of respondant disobeying the court. It was too obvious an attempt to again protect the respondant/attorney and prejudice appellant.

In the prior, parent action, appellant was the defendant, and respondant was attorney for the plaintiff(Abbott). Since appellant would be directing her present action of fraud upon the court against the respondant/attorney, Abbott was not made a party defendant. "Proper parties are not always necessary or indispensable parties." The superior court initially sustained the demurrer to the initial complaint

on "all grounds stated in the demurrer",which included a defect and misjoinder of parties (a failure to make Abbott a defendant). Therefore appellant asked the court for leave to file an amended complaint, to add Abbott as a defendant (stated in her Opposition to the Demurrer to the amended complaint, CT 153:18). Appellant also requested this at the hearing, where the judge responded, sarcastically (RT 7:4):

> "MS. KONIC: I would like to file another amended complaint. May I have leave of the court to do this?
> THE COURT: You do what you want. I'm only going to rule on the demurrer today. Okay."

Leave of the court is required in order to file a second Amended Complaint, so appellant could not do what she wanted in this matter. Courts are supposed to be liberal in granting such permission. This judge would not. Appellant also requested this, in her Opposition to the Demurrer to the (initial) Complaint (CT 65:15). The Court of Appeal's Opinion stated (IIa).

> "As a matter of law, her written pleadings failed to establish fraud. No different result would apply if appellant had joined Abbott as a party defendant."

There has never been a trial on the merits of "fraud upon the court", or fraud, in general, for that matter. Respondant never filed a verified answer, so it seems improper for the Court to make such a remark. For the purposes of a demurrer, all facts are deemed true. Stating a cause of action for "fraud upon the court" is all that is required, at this time, and establishing fraud is not. That is for a trial to determine. Also, the court's other comment about joining Abbott seems improper. Whether Abbott should or should not be joined, and the matter of fraud is another issue.

The Court of Appeal threatened appellant with possible financial sanctions (IIa).

> " Further efforts to litigate this matter will not change the outcome, but may result in imposition of financial sanctions against appellant for the protection of respondant and the judicial system. "

In appellant's opinion, it seems highly improper of the court to threaten her in this manner. The judicial system recognizes the fact that miscarriages of justice can occur.

That is the reason there are review courts on many levels, and appellant is entitled to take full advantage of every opportunity she has for further review. Her case is not one which is frivilous and without merit. The Court of Appeal mentions "the protection of respondant and the judicial system." It appears to appellant this means to protect the respondant/attorney from the consequences of his acts and the courts from alittle embarrassment in having to admit they have made incorrect decisions. They forget their main concern is supposed to be the protection of the citizens of this country.

THE PRIOR, PARENT ACTION

Judgment in the prior, tenant/landlord case was for a violation of California Civil Code 789.3(c) from May 16 to August 25, 1981. Appellant was the defendant/landlord and respondant was attorney for the plaintiff/tenant (Abbott). In a dispute over Abbott having an extra occupant, which violated the lease.

Appellant received written Notice that Abbott would terminate the lease, vacate and surrender possession of the apartment(unit) by April I5, I98I, which she carried out. (CT I2C & I2I,in evidence). A unilateral surrender, breaching the term of the lease, constitutes "abandonment", and under California Civil Code I95I.2, the lease terminated immediately, and appellant/landlord resumed possession. There was no notice to the contrary from Abbott prior to carrying out her surrender.

Abbott testified, later, that she returned April 26, I98I to move back, and found appellant in possession. Abbott considered this was "wrongful eviction", but,in fact, she was entering illegally because appellant now had possession. On April 29, I98I, respondent sent appellant a Settlement Offer, in Abbott's behalf, which appellant rejected as financially unfair. Then, on May 4, I98I, Abbott wrote appellant asking to "continue to rent" the unit and included a check for past delinquent rent,

to which appellant was entitled to under section 1951.2. Appellant accepted her as a tenant again, but because the Courts have ruled that abandonment is "immediate, complete, and final" and cannot be revived, and only a new possession can result, there was a new, second tenancy, and not a continuous one.

Abbott never again went into residency, after her surrender on April 15, 1981. On Saturday, May 16, 1981, appellant lost keys to the unit and fearing someone found them and might use them, she had a locksmith change the lock combinations, as an emergency measure. Abbott testified she had not given appellant her new, home address, upon her surrender; and she was not working on the weekend. Appellant put a note on the door of the unit for Abbott. The next day, appellant found the keys, so on Monday, May 18, 1981 she had the locksmith change the lock combinations back to the original ones.

Yet, Abbott testified she returned May 20, 1981 and could not unlock the locks. Abbott

also admitted, in testimony, that she never notified appellant of any problem in unlocking the doors.

Appellant's locksmith could prove that Abbott should have been able to unlock the locks after May 16, 1981. He asked if he could submit a written statement of his testimony instead of taking time away from his business to testify. Appellant's attorney told her this would be as acceptable, but the court did not accept it, at the trial. It was included for the appeal, however.

Judgment was for a violation of California Civil Code 789.3(b), which says in essence that a landlord shall not,with intent to terminate the occupancy of property used by the tenant her residence...change the locks.. (16a).

Since Abbott surrendered her residency a month before on April 15, 1981, the requirement of the section was not met. The property was not used by Abbott as her residence a month later, when the judgment claimed a violation (judgment stated May 16 to August 25, 1981).

This is the main "crux" of the case, and therefore the judgment was clearly in error.

The Court of Appeal stated 3 main points:

(I) That Abbott surrendered and vacated the premises before April I6, I98I.

(2) That appellant continued to demand rent and enforced her demand by filing 3 separate actions in small claims court.

(3) That on April 26, I98I, appellant had an estate sale out of the premises leased by Abbott. (Opinion: Ia-2a).

But--since Abbott surrendered possession by April Ic, I98I, the unit would be in appellant's possession on April 26, I98I and not Abbott's. Therefore, in the Court of Appeal's opinion something intervened to reverse the surrender. Although the Court is not specific, it refers to appellant's small claims actions for rent. (which was delinquent rent,however).

But, the Court of Appeal falsely stated that the actions were filed after Abbott's surrender. The first two actions were filed

before she vacated and surrendered, when rent was delinquent. There were no actions filed by appellant after she resumed possession, upon Abbott's abandonment.

Later, Abbott changed her mind, and on May 4, 1981, she wrote appellant that she wanted to continue to rent the apartment. Since Abbott had surrendered her former possession, which by law was final, a new, second tenancy resulted. When rent became delinquent again, the third small claims action was filed during the second tenancy.

Abandonment is determined by the tenant, and not the landlord. Abbott had been served notice of the first action, prior to her abandonment and it had been her choice to carrying it out by vacating. Abbott had also demanded the return of her Security Deposit (money). The law requires landlords to either return the deposits or give an accounting of delinquent rent, damages, etc. A demand for money, either by a landlord or a tenant does

not reverse an abandonment. This would be a ridiculous contention, and there was never any legal authority offered to substantiate such a theory.

Another false statement made by the Court of Appeal Opinion was: (Ia)

> "A dispute arose between appellant and Abbott about Abbott's right to have a house guest. Abbott consulted an attorney who advised her that under the lease she had a right to have a house guest."

The letter was falsely quoted. What it did state with regards to the lease was: (CT I20)

> "..nothing prevents my client from subletting or assigning the lease in question."

This evidence was introduced at the trial by appellant because it benefitted her side of the case. It is outrageous conduct on the part of the Court of Appeal to falcify this evidence so as to sabatoge appellant's case.

Abbott could assign or sublet, but the lease did prohibit extra occupants, without appellant's written approval. There was no written Opinion by the municipal court, but the judgment shows that appellant was credited with

$250.00 for the extra person. (CT 61). This shows Abbott had not sublet or assigned the lease, and that the extra occupant was in violation of the lease contract. Therefore, Abbott violated the lease--not appellant. The Court of Appeal was trying to show that appellant constructively evicted Abbott, and the judgment shows this was not true.

The Court of Appeal Opinion falsely stated:

> "Appellant also included, as an instance of extrinsic mistake, inadvertence and excusable neglect, the fact that she wanted to call the locksmith as a witness but her attorney advised her that it was unnecessary." (5a).

> "Respondant herein was not responsible for appellant's counsel's decision not to call the locksmith as a witness." (8a).

Appellant's attorney never advised her that calling the locksmith as a witness was unnecessary, nor did he advise her against calling him. No where in the Record is this stated. It is totally fabricated.

The locksmith did not want to take time from his business to testify and asked if

his written testimony would be as acceptable. Appellant's attorney told her that it would be. However, the trial court did not accept it. It was included in the appeal to the appellate department.

The Court of Appeal is trying to make it appear that appellant's attorney decided the locksmith's testimony would not benefit her case, which is not true. The fact that her attorney introduced the written statement at the trial indicates this. The Court of Appeal wants to discredit appellant's testimony that the locksmith changed the lock combinations on Saturday, May 16, 1981 and changed them back, 2 days later, on May 18, 1981, when the keys were found. The locksmith's written statement substantiates appellant's testimony and shows that Abbott's testimony that she could not unlock the locks after May 18, 1981 is not true. The unit was still vacant at this time as Abbott never resided in said unit again, after her surrender on April 15.

The Court of Appeal's Opinion refers to a "Notice of Abandonment", which is,in fact, a "Notice of a Belief of Abandonment", under California Code of Civil Procedure 1951.3. It is not required, but a means by which a landlord may determine abandonment by a tenant, when there is uncertainty. (19a). Abbott had two tenancies. She abandoned the first tenancy upon Notice of Surrender, therefore according to subdivision(f), a Notice of Belief of Abandonment would be redundant and unnecessary. One was sent during her second tenancy,however.

The Court of Appeal falsely stated that appellant substituted counsel several times during the trial and appeal in the municipal court action (6a), dramatizing it with a footnote. According to Webster's Dictionary, the word "several" means more than two. Appellant was represented by one attorney during the trial and one attorney during her appeal to the appellate department, totalling two attorneys. It would appear the Court wants to make appel-

lant look frivilous in this regard. Since the Court of Appeal thought this important enough to include in the Record, appellant decided it should be corrected. Please note also that Abbott was represented by two attorneys, also, respondant and attorney Trainotti, but this was not stated. (CT I2O & I2I).

It is also not true when the Court of Appeal said appellant stated that she held respondant responsible for the fact the locksmith did not testify. No where in the Court Record is this stated. (IOa).

FEDERAL AND STATE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal does not come from a trial on the merits of "fraud upon the court". It comes from a judgment of dismissal of the action, after the demurrer was sustained, without leave to amend, which was affirmed by the Court of Appeal. Federal courts have abolished demurrers.

Because of the nature of this appeal, the

Statement of the Case contains not only facts, but a discussion on laws and precedents as well because the latter also constitute facts which demonstrate a deliberate, arbitrary and capricious effort to prejudice appellant during her litigation. Therefore, to avoid repetition, appellant will not go into detail with regards to the same laws and precedents, in this section.

I. The prejudice referred to was not the result of mere error, but an abuse of discretion--abuse of judicial power, by all of the courts, but emphasis is directed towards the Court of Appeal from which this appeal stems. According to Auditor General v. Hall, 139 A.L.R. 1022 (1942) this constitutes a violation of "Due Process", guarenteed under the Fourteenth Amendment of the Federal Constitution. (1&a). Appellant is guarenteed substantial justice and fundamental fairness in the courts of this country.

Substantiality of the Federal question raised in this appeal may perhaps be demon-

strated by reference to I6A-Am.Jur. (I979):

> "The Federal Supreme Court cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles, which have been established in our system of jurisprudence for the protection and enforcement of private rights." (p. 999, line IC).

As described in the Statement of the Case, the Court of Appeal falsely stated facts and evidence,failed to follow federal and state laws and decisions(Stare Decisis) resulting in a "Conflict of Decisions. The Court is required to consider and speak to the legal contentions of both sides, yet it ignored appellant's view.

The written opinion of the Court of Appeal was lacking in factual and legal substance and was sometimes so vague it was difficult to determine the court's position. With all the many grounds which were discussed, the Court gave only one authority in its entire opinion, which was Throckmorton, an archaic and outdated precedent, on the subject of extrinsic fraud.

2. Respondent is an attorney, and an officer

of the court, which puts him in a special position of trust. The courts depend upon his presentations. When he deceived the courts, it created an imbalance in the adversary system, impaired the litigation process, and thereby corrupted the administration of justice. As stated in Bulloch v. United States, 763 F.2d 1115 (1985):

> "Fraud upon the court" occurs where the court is corrupted or influence is attempted or where a judge has not performed his judicial function i.e. where impartial functions of the court have been directly corrupted."

Fraud upon the Court can only be the result of actions by an officer of the court--attorneys, judges. As stated in Martina Theatre Corp. v. Schine Chain Theatres Inc., 278 F.2d 798 (1960):

> "Fraud upon the Court"is that species of fraud which does or attempts to, defile the court itself, or fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases."

The actions of the respondant/attorney and the judges and justices have been manifestly

unfair to appellant, the aggrieved party in this action, which resulted in a gross miscarrige of justice, and which makes a mockery of the court system. This is a serious matter which deserves the review and investigation by this Court. A democrasy depends upon a fair and equitable judicial system. As stated in "The Importance of Sound Jurisprudence" (Approved Appellate Briefs, by John Allen Appelman, 1956):

> "John Citizen rests his hopes in democrasy in our judicial system. He has deep, implicit conviction that justice will emerge triumphant, through out the courts. If it does not, and we who have the ability to correct our errors do not, then we have failed our fellow citizen. And, if they lose faith in our courts, there is little left for them to believe in."

The matter extends beyond the harm and injustice to appellant, who has spent 5½ years trying to vacate and reverse the prior judgment. There is a question of puclic importance as well.. Public faith in the judicial system. Also the confusion caused by the "Conflict of Decisions involved in this case, may well

increase litigation as a result.

CONCLUSION

The questions presented in this appeal are indeed substantial, and this Court is urged to note probable jurisdiction and set the case down for plenary briefing and argument, or the judgment should be summarily reversed and remanded for further proceedings consistent with this opinion. If this Court finds this appeal is improvidently taken, would it please regard it as a Petition for a Writ of Certiorari, according to 28 U.S.C., section 2103. Then appellant prays that a Writ of Certiorari be issued from this Court.

Respectfully submitted,

February, 1967 Nancy Ann Konig

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NANCY A. KONIG, Plaintiff, vs. JAY PICKING, Defendant.	CASE NO. SOC 74369 ORDER DISMISSING ACTION JUDGMENT OF DISMISSAL FILED JUL 01 1985 DEPUTY

This cause came on regularly for hearing on April 9, 1985, and June 4, 1985, in Department "L" of the above-entitled court, on Defendant, JAY PICKING's Demurrer to Plaintiff, NANCY A. KONIG's First Amended Complaint before the Honorable Eugene J. Long. Plaintiff, Nancy Ann Konig, appeared in propria persona; Defendant, Jay Picking, appeared in propria persona. Evidence having been presented by both Plaintiff and Defendant, and thereafter submitting the matter for the court's determination, the court having weighed the evidence.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that the demurrer of Defendant, Jay Picking, to plaintiff's First Amended Complaint

be and the same is hereby sustained without leave to amend:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the action of Plaintiff, Case No. SCC 74369, be and the same is hereby dismissed with prejudice; Pursuant to Section 581 (c) CCP and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff, Nancy A. Konig, take nothing by the Complaint herein on file and that Defendant, Jay Picking, have and recover from plaintiff, his cost of suit herein incurred; in the sum of: $ 126.00.

DATED: Jul 1 1985

Eug J Long

Judge of the Superior Court

Eugene J. Long

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

NANCY A. KONIG, NO. BCI5732

vs.

JAY PICKING.

This is an appeal from an order of dismissal entered after a demurrer was sustained without leave to amend. The history of the lawsuit is as follows: On January I5, I98I, appellant Nancy A. Konig, leased an apartment to one Sharon C. Abbott(Abbott) for a term of one year. Thereafter, a dispute arose between appellant and Abbott about Abbott's right to have a house guest. Abbott consulted an attorney who advised her that under the terms of the lease she had a right to have a house guest. Abbott informed appellant that she would surrender the premises due to the dispute and physically vacated the premises before April I6, I98I. Appel-

lant continued to demand payment of rent, however, and enforced her demand by filing three separate actions in small claims court. Abbott made rental payments through June I4, I98I, after the filing of the small claims actions.

On April 26, I98I, appellant held an estate sale out of the premises leased by Abbott. On April 30, I98I, appellant wrote Abbott demanding return of the apartment keys, however. On May I6, I98I appellant had the apartment lock changed. On May 20, I98I, Abbott attempted to gain entry to the premises but was unable to do so. She filed suit against appellant in municipal court for damages pursuant to Civil Code section 789.3 for forcible entry, wrongful eviction, trespass and forcible detainer. After the suit was filed, appellant filed a notice of abandonment with Abbott's attorney, who answered and denied that Abbott intended to abandon the premises.

Trial took place on August 24 and 25, I98I.

Appellant testified that she had changed the apartment locks because she lost her set of keys to Abbott's apartment, that she found the keys on May 17, 1981, a Sunday, and that she had the locksmith change the locks back to the original combination on May 18, 1981. Abbott testified that she tried to gain entry to the apartment on May 21 and May 29, 1981, as well as on May 20th, but that her keys would not work.

Judgment was entered in favor of Abbott and against appellant on September 2, 1981, in the sum of $3,743. plus $2,000 attorney fees. Appellant appealed the judgment to the appellate department of the Superior court which affirmed the judgment on June 16, 1983, in a ten-page written opinion. The appeal turned on claims of insufficient evidence.

Appellant was represented by counsel during the trial and appeal of the municipal court

action.[1] Abbott was represented in that action by Jay A. Picking, respondant herein.

Dissatisfied with the outcome of her appellate department appeal, appellant discharged her counsel and petitioned the appellate department for reconsideration, which was denied as were petitions for hearing and for reconsideration, in the Supreme Court. Appellant then filed a "Notice of Appeal" in the United States Supreme Court and later docketed an appeal/petition for writ of certiorari in the United States Supreme Court. The appeal was dismissed for lack of jurisdiction. The petition for writ of certiorari was denied. A petition for an extension of time to file a petiton for rehearing in the United States Supreme Court was denied on April 24, 1984.

On July 20, 1984, appellant noticed a motion in municipal court to vacate and set

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1. Appellant substituted counsel several times during those proceedings.

aside the judgment for "fraud upon the court, extrinsic fraud and mistake, inadvertence and excusable neglect". The purported "fraud" which that motion addressed consisted of various factual and legal arguments contained in the brief on appeal which respondant filed in the appellate department on behalf of Abbott, and whose accuracy appellant disputed. The motion also disputed the accuracy of allegations in the municipal court complaint and in Abbott's trial brief. Appellant also included as an instance of extrinsic mistake, inadvertence and excusable neglect, the fact that she wanted to call the locksmith as a witness,but her attorney advised her that it was unnecessary.

The motion to vacate and set aside the judgment was denied by the municipal court on August IO, I984, the court ruling that the facts set forth in the motion did not establish fraud, mistake,inadvertence or neglect; and that all of the underlying factual issues,

as to which appellant claimed fraud, had been adjudicated previously by the municipal court and reviewed on appeal and that no new evidence was presented.

Undaunted, on August 2[illegible], 1984, appellant filed suit in superior court against respondant herein seeking to set aside the municipal court judgment and to enjoin its enforcement. The alleged basis for the relief sought was a reiteration of the purported "fraud" cited in the earlier motion to vacate.

A demurrer to the complaint was filed. While it was pending, an amended complaint was filed which in no way changed the factual picture. The initial demurrer was sustained. A demurrer to the amended complaint was sustained without leave to amend. The complaint was dismissed and this appeal followed.

In response to a request that it state its reasons for sustaining the demurrer, the superior court found that the action was barred by the municipal court decision which denied vacation of judgment. Appellant now

asserts that she was entitled to file the superior court action because she was not provided a full hearing on her motion to vacate. She further seeks an order from this Court directing that she be permitted to amend her complaint to add Abbott as a party defendant.

In every law suit there is a winner and a loser. Rarely, if ever, is the loser satisfied with the result; and frequently the loser feels that there has been a miscarriage of justice. Nonetheless, every lawsuit must eventually end. Clearly, the time for this litigation to end has long since passed.

Appellant had a full trial on the merits of her case and exhausted her appellate remedies. She has now characterized respondant's behavior as fraud on the court and extrinsic fraud, apparently recognizing that that characterization is the only basis upon which she can obtain review of arguments which are clearly untinely. As a matter of law, the facts she relies on do not make out even a prima facie case of fraud, intrinsic or extrinsic.

Extrinsic fraud is found where a party has been prevented from presenting his case by fraud or deception practiced on him by his opponent which results in keeping him away from court or keeping him ignorant of the lawsuit. (8 Witkin, Cal.Procedure(3d ed.) section 204,p. 602).

Appellant had full opportunity to litigate the allegations of the municipal court complaint and the trial brief at the municipal court trial. Respondant herein was not responsible for appellant's counsel's decision not to call the locksmith as a witness. Arguments which respondant made in Abbott's brief on appeal in the appellate department could not have prevented appellant from presenting her case at trial. No showing is made that appellant was in any way hampered in her opportunity to attempt to refute those arguments on appeal. The fact that she was unsuccessful does not render respondant's argument fraudulent.

There is no merit to appellant's claim that

she was not afforded a full hearing in the Municipal court on her motion to vacate. The basis for this complaint was the court's refusal to allow her to orally recite each of the points raised in her voluminous written pleadings. The court expressed its familiarity with the written pleadings and allowed appellant ample opportunity for oral argument, and to advance any new theories or explanations she wished to put forth. No useful purpose would have been served by allowing appellant to reiterate orally that which she had already submitted in writing. As a matter of law, her written pleadings failed to establish fraud. No different result would apply if appellant had joined Abbott as a party defendant.

Appellant has had her day in court and then some. It is time for her to put the unpleasantness of this litigation behind her and get on with her life, and for the courts to turn their attention to other claims that have not yet been adjudicated. Further efforts to litigate this matter will not change the out-

come, but may well result in imposition of financial sanctions against appellant for the protection of respondent and the judicial system.

The judgment is affirmed.

NOT TO BE PUBLISHED

FEINERMAN, P.J.

We concur:

ASHBY, J.

HASTINGS, J.

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

DIVISION: 5 Date: 08/29/86

Nancy A. Konig

202 West 37th Street

Long Beach, CA 90807

RE: Konig, Nancy A

vs.

Picking, Jay

2 Civil B015732

Los Angeles No. SCC74369

The Court:

PETITION FOR REHEARING DENIED
August 29, 1986

And respondent's request for sanctions denied.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, No BC15732

BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

KONIG

v.

PICKING

Supreme Court
FILED
Oct 22 1986

Laurence P. Gill
Clerk

~~Deputy~~

Appellant's petition for review DENIED

BIRD

Chief Justice

Nancy Ann Konig
202 West 57th Street
Long Beach, CA. 90807
(213) 424-7753
By Appellant, In Propria Persona

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 5

Nancy A. Konig,plaintiff and appellant

v. NO.BCI5722

Jay Picking, defendant and respondant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Nancy Ann Konig, plaintiff and appellant, above named, hereby appeals to the Supreme Court of the United States from a judgment of an order of dismissal of her case by the superior court of the State of California,county of Los Angeles, entered July I, I985. This Court affirmed the Judgment of Order of Dismissal,filed August 7, I986,and also denied Appellant's petition for rehearing,filed August 29, I986

January 9, I987 _____

Nancy Ann Konig, in Pro Per

Nancy Ann Konig
202 West 37th Street
Long Beach, CA 90807
(213) 424-7753

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

NO._____

Nancy A. Konig, Appellant

v.

Jay Picking, Appellee.

APPLICATION FOR EXTENSION OF TIME TO DOCKET CASE ON APPEAL

Application is hereby made for extension of time,to and including March 17, 1987, for appellant, Nancy Ann Konig, to docket her case on appeal to this Court, in accordance with Supreme Court Rule 12.2.

Enclosed are: Order of Dismissal of her case, filed July 1, 1985, by the Superior Court of California, County of Los Angeles; the Opinion and order affirming the order of dismissal of her case, by the Court of Appeal of the State of California, Second Appellate District,filed August 7, 1986; the order of the Court of

Appeal denying her Petition for Rehearing, filed August 29, I986; the order of the Supreme Court of the State of California denying Review, filed October 22, I986; Notice of Appeal to this Court, filed in the Court of Appeal, State of California, Second Appellate District, on January 9, I987, copies which are submitted herewith.

Jurisdiction of this Court is based upon 28 U.S.C., sections I257 and 2I0I(c). This civil action comes within the provision because the case was appealed to the highest state court, and appellant exhausted all judicial remedies available to her in California.

Appellant's ground for granting an extension of time is that her 8I year old Mother has been ill, and appellant has not had time to finish her Jurisdictional Statement. The extension would be greatly appreciated.

January 9, I987

Nancy Ann Konig, Appellant and Plaintiff, in Pro Se

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES-

Amendment Fourteen-Due Process

"No state shall deprive any person of life, liberty, or property without "due process of law. Nor deny to any person within its jurisdiction the equal protection of the law."

CALIFORNIA CIVIL CODE 789.3(b)

"In addition landlord shall not with the intent to terminate the occupancy under any lease or other tenancy or estate at will however created, of property used by the tenant as his residence, willfully (I) prevent tenant from gaining reasonable access to property by changing the locks, using a bootlock or by any other similar method or device."

CALIFORNIA CIVIL CODE 1951.2 (a):

"Except as otherwise provided in section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of term, or if his right to possession is

terminated by lessor because of a breach of the lease, lease is terminated.

CALIFORNIA CIVIL CODE 1951.3:

(a) Real property shall be deemed abandoned by lessee, within the meaning of section 1951.2 and lease shall terminate, if lessor gives written notice of his belief of abandonment as provided in this section and lessee fails to give lessor written notice, prior to date of termination specified in lessor's notice, stating he does not intend to abandon real property and stating an address at which lessee may be served by certified mail in any action for unlawful detainer of real property.

(f) Nothing in this section precludes lessor or lessee from otherwise proving real property has been abandoned by lessee within the meaning of section 1951.2.

CALIFORNIA CODE OF CIVIL PROCEDURE 472d:

Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the

decision or order is based which may be by reference to appropriate pages or paragraphs of the demurrer.

CALIFORNIA CODE OF CIVIL PROCEDURE 1005.5:

"A motion upon all grounds stated in the written notice thereof is deemed to have been made and pending before the court for all purposes upon the due service and filing of the notice of motion, but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled."

FEDERAL RULE OF CIVIL PROCEDURE 60(b):

Relief From Judgment or Order: This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding.. or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

28 U.S.C., Section 1257:

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

(3) By writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution,treaties,laws of the United States.

28 U.S.C., Section 2103:

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a state..in a case where the proper mode of a review is by petition

for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.